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Attorneys for Defendant  
DEERE & COMPANY,  
incorrectly named as JOHN DEERE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA, ex rel.  
GREGOR LESNIK; STJEPAN PAPES,

Plaintiffs,

vs.

EISENMANN SE, et al.

Defendants.

Case No. 5:16-cv-01120-LHK

**DEFENDANT DEERE & COMPANY'S  
REPLY MEMORANDUM IN SUPPORT  
OF JOINDER AND MOTION TO  
DISMISS PLAINTIFFS' SECOND  
AMENDED COMPLAINT**

Date: October 4, 2018  
Time: 1:30 p.m.  
Judge: Hon. Lucy H. Koh  
Courtroom: 8

Second Amended  
Complaint Filed: November 17, 2017  
Trial Date: Not Set

## REPLY MEMORANDUM

### I. INTRODUCTION

Plaintiff and relator Gregor Lesnik's and plaintiff Stjepan Papes' (collectively, "Plaintiffs") oppositions to Deere & Company's ("Deere") Joinder and Motion to Dismiss Plaintiffs' Second Amended Complaint ("SAC") (Dkt. 139 ("Opp.)) and to the motion to dismiss filed by co-defendant Eisenmann Corporation ("Eisenmann") (Dkt. 137) only demonstrate that Plaintiffs fail to state any claim against Deere here, and that their claims against Deere should be dismissed. In addition to the arguments addressed below, Deere joins in Eisenmann's reply memorandum in support of its motion to dismiss (Dkt. 153).

### II. ARGUMENT

At the outset, Plaintiffs' Opp. should be stricken as it was untimely filed and served at 1:41 a.m. on April 25, 2018 without Plaintiffs first seeking leave for any extension. *See* N.D.Cal. L.R. 5-1(e)(4), 6-1(b), 6-3.

More crucially, Plaintiffs' Opp. only underscores the lack of any factual details required to plead fraud, trafficking or racketeering activity by any person at Deere. Plaintiffs only point to their collective allegations against all defendants as the foundation for their claims against Deere. Opp. at 2 (citing SAC ¶¶ 11, 102, 111). But even if such allegations were sufficient (they plainly are not), Plaintiffs' failure to tie specific defendants to specific allegations is alone grounds for dismissal.<sup>1</sup> Plaintiffs cite an unpublished out-of-circuit case to suggest that a conclusory allegation that "all defendants" undertook actions "described in the complaint" are sufficient to plead fraud. Opp. at 3. Ninth Circuit law, however, is directly to the contrary. As this Court recently held, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . .

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<sup>1</sup> Particularly illustrative of Plaintiffs' impermissibly collective allegations is their allegation that "**Defendants** did not provide workers compensation insurance." Dkt. 137 at 6 (emphasis added). Such a bald and sweeping allegation is unsupported by Plaintiffs' own SAC and Request for Judicial Notice, demonstrating Plaintiffs' naked attempt to "lump" defendants here together in the absence of any facts pled showing any wrongdoing by Deere. *See* SAC ¶ 105(e) (alleging that the "licensed principal" of "Vuzem USA Company" represented to California State Licensing Board that it had no workers compensation insurance); Dkt. 136-1 (reflecting purported workers compensation search results for certain defendants, but not Deere).

1 and inform each defendant separately of the allegations surrounding his alleged participation in  
 2 the fraud.” *United States v. Safran Grp.*, No. 15-CV-00746-LHK, 2017 U.S. Dist. LEXIS  
 3 137264, at \*29-30 (N.D. Cal. Aug. 25, 2017) (citation omitted) (citing *Swartz v. KPMG LLP*, 476  
 4 F.3d 756, 764 (9th Cir. 2007)); *see also United States ex rel. Swoben v. United Healthcare Ins.*  
 5 *Co.*, 848 F.3d 1161, 1181-82 (9th Cir. 2016) (affirming dismissal of FCA claims as to certain  
 6 defendants for failure to plead “details linking these defendants to the [alleged] scheme”).

7 The only Deere-specific allegations cited by Plaintiffs is in paragraph 83 of the SAC. But,  
 8 that paragraph only alleges, based on information and belief, Deere’s state of incorporation and  
 9 principal place of business, and that Deere contracted with Eisenmann, which in turn, allegedly  
 10 contracted with other unidentified entities, to “bring in construction workings under false B1  
 11 visas who are paid less than prevailing wages . . .” Opp. at 1-2. This plainly fails to allege the  
 12 “who, what, when, where, or how” that Plaintiffs admit is required to state a claim for fraud.

13 Plaintiffs do not identify a single person at Deere who orchestrated, discussed, or  
 14 implemented any purported scheme either internally or in connection with any other defendants to  
 15 conceal or avoid any purported obligation (on the part of other co-defendants or unnamed  
 16 “contractors,” not Deere) to pay the government funds. Nor are any details regarding any  
 17 underlying purported immigration or visa law violation pled with particularity. Plaintiffs’  
 18 conclusory allegations that some unidentified workers worked at some unidentified Deere  
 19 location at some unknown time through unidentified contractors (SAC ¶ 83, 111) fail to apprise  
 20 Deere of the particular allegations against it so that it may investigate Plaintiffs’ claims of fraud.  
 21 *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (“the complaint must specify such facts as  
 22 the times, dates, places, benefits received, and other details of the alleged fraudulent activity”).

23 Plaintiffs’ arguments also confirm that their allegations of scienter are conclusory and not  
 24 plausible. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, — U.S. —, 136 S. Ct.  
 25 1989, 2002 (2016) (“*Escobar*”) (the knowledge requirement of the FCA is “rigorous” and  
 26 “strict[ly] enforce[d]”). Plaintiffs claim that Deere “knowingly assisted defendants including  
 27 Eisenmann and ISM Vuzem, d.o.o. in ‘knowingly’ concealing, and/or ‘knowingly and  
 28

1 improperly’ avoiding or decreasing an obligation to pay the federal government. (8 C.F.R. §§  
 2 22.1 and 103.7).” Opp. at 3. Plaintiffs, however, do not specify any individual at Deere who  
 3 purportedly knew it was “assist[ing]” Eisenmann, ISM Vuzem, d.o.o., or any other defendant  
 4 with any purported scheme to conceal any obligation to pay. Collective allegations of corporate  
 5 scienter are insufficient to state a claim for fraud under the FCA. *United States v. Scan Health*  
 6 *Plan*, No. CV 09-5013-JFW (JEMx), 2017 WL 4564722, at \*5 (C.D. Cal. Oct. 5, 2017) (“for  
 7 scienter to be attributed to a corporation, Plaintiffs must sufficiently plead that at least one of the  
 8 corporation’s officers had the requisite scienter at the time they made the allegedly misleading  
 9 statements.” (internal quotations and citations omitted)) (citing *In re Int’l Rectifier Corp. Sec.*  
 10 *Litig.*, 2008 WL 4555794, at \*21 (C.D. Cal. May 23, 2008)).

11 Nor do Plaintiffs plead any facts showing how Deere’s alleged actions were material to an  
 12 avoidance of any payment to the Government, regardless of the specific type of theory of FCA  
 13 liability put forward by Plaintiffs. *Escobar*, 136 S. Ct. at 2002-2003 (materiality requirement  
 14 “strictly enforced”).

15 Plaintiffs’ trafficking and racketeering claims against Deere similarly lack factual  
 16 pleading. None of the alleged trafficking activities identified by Plaintiffs—such as threats of  
 17 physical, mental or financial harm—contain any allegations of conduct specifically by Deere  
 18 (Dkt. 137 at 21-22; SAC ¶¶ 155, 202-204, 219). And, none of the required elements to establish  
 19 any racketeering activity by Deere are pled. *See* Dkt. 137 at 23 (citing *United States v. Rastelli*,  
 20 870 F. 2d 822, 828 (2d Cir.), *cert. denied*, 493 U.S. 982, 110 S. Ct. 515, 107 L. Ed. 2d 516  
 21 (1989)) (racketeering claim requires “(1) that the **defendant agreed to commit** the substantive  
 22 racketeering offense through agreeing to participate in two racketeering acts; (2) that he **knew the**  
 23 **general status** of the conspiracy; and (3) that he **knew the conspiracy extended** beyond his  
 24 individual role” (emphasis added))). These claims should be dismissed as well.

25 Finally, Plaintiffs do not dispute that, if their FCA claims against Deere fail to meet the  
 26 requirements of Rule 9(b), their quasi-contractual claims should also be dismissed for lack of  
 27 particularity. *In re Arris Cable Model Consumer Litig.*, No. 17-CV-01834-LHK, 2018 WL  
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1 28/8085, at \*10 (N.D. Cal. Jan. 4, 2018).

2 **III. CONCLUSION**

3 For the reasons stated above, in Deere's moving papers, and in Eisenmann's moving and  
4 reply papers, Deere hereby requests that each of Plaintiffs' causes of action against it be  
5 dismissed with prejudice for failure to state any claim.

6 Dated: May 1, 2018

MORGAN, LEWIS & BOCKIUS LLP

7 By /s/ Tera M. Heintz

8 Tera M. Heintz  
9 Michael Q. Eagan, Jr.

10 Attorneys for Defendant  
11 DEERE & COMPANY,  
12 incorrectly named as JOHN DEERE  
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 2018, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and service via transmittal of a Notice of Electronic Filing.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 1, 2018, at San Francisco, California.

/s/ Michael Q. Eagan, Jr.  
Michael Q. Eagan, Jr.